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No. 294

In the Supreme Court of the United States

OCTOBER TERM, 1944

CITY BANK FARMERS TRUST COMPANY, FORMERLY KNOWN AS THE FARMERS' LOAN AND TRUST COMPANY, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF HELEN HALL VAIL, DECEASED, PETITIONER

v.

GEORGE T. MCGOWAN, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-EIGHTH COLLECTION DISTRICT, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	13
Conclusion	19
Appendix	20

CITATIONS

Cases:	
City Bank Farmers Trust Co. v. *Hoey*, 101 F. 2d 9	16
Commissioner v. *Greene*, 119 F. 2d 383, certiorari denied, 314 U. S. 641	16
Milliken v. *United States*, 283 U. S. 15	17
Nichols v. *Coolidge*, 274 U. S. 531	17
United States v. *Wells*, 283 U. S. 102	14, 17
Statutes:	
New York Civil Practice Act (Cahill, Seventh Ed.):	
Sec. 1356	21
Sec. 1357	21
Sec. 1383	22
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302	13, 20

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York (R. 387–400) is reported in 43 F. Supp. 790, and the opinions of the Circuit Court of Appeals for the Second Circuit (R. 436–444) are reported in 142 F. 2d 599.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 27, 1944 (R. 444–445). The

petition for a writ of certiorari was filed on July 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain allowances made to the decedent's daughters and others in the decedent's lifetime out of her estate pursuant to orders of the Supreme Court of New York, the decedent having been adjudged an incompetent, are includible in her gross estate under the contemplation of death provision of Section 302 (c) of the Revenue Act of 1926, as amended.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 20–22.

STATEMENT

This is a suit against the Collector of Internal Revenue for the recovery of federal estate taxes paid by the City Bank Farmers Trust Company, as administrator of the estate of Helen Hall Vail (R. 2–12), who died on December 27, 1935 (R. 74). The evidence introduced consisted entirely of exhibits which, so far as material here, are as follows:

1. The record of a proceeding in the Supreme Court of New York in and for New York County, wherein, on August 11, 1926, the decedent was declared an incompetent (R. 77–95).

2. The record of a proceeding in the same court wherein, upon petition of the decedent's only living daughter, Mrs. MaBelle Houghton Plumb, dated October 8, 1926, the court, after a hearing before a referee appointed by it and upon his report, entered an order, on January 14, 1927, for an allowance to Mrs. Plumb out of the surplus income of the incompetent of $50,000 a year, as prayed for, and an equal amount to the general guardian of the three minor children of the incompetent's deceased daughter, Laura Houghton Harris; $3,000 per year to one of the incompetent's sisters, and $2,000 per year to each of the incompetent's three remaining sisters and a brother (R. 170–174).

3. The record of a proceeding in the same court wherein, upon the further petition of Mrs. Plumb, the court, after a hearing before another referee appointed by it, and upon his report, made a further order, on June 3, 1932, for additional allowances to Mrs. Plumb, out of the surplus income of the incompetent as prayed for, of $25,000 per year, payable in quarterly installments of $6,250 each, and in addition thereto the sum of $131,250, representing a payment of $25,000 per year for the then past five years, and also in addition $6,250, being the quarterly installment due March 31, 1932, of the additional allowance of $25,000 per year, and like allowances to the general guardian of the three minor sons of the decedent's deceased daughter; the order further

directing that certain securities of the incompetent be sold in order to raise sufficient cash out of which to make payment of the allowances ordered to be made (R. 285–293).

The evidence taken before the referee on the first petition for allowances disclosed that the decedent had made small annual allowances during various periods to her sisters and brother, and, as regards allowances made to her two daughters, that, after the marriage of her deceased daughter in 1912 she had given to each an annual allowance of $1,500, increasing this in 1913 to $3,000, and in 1914 to $6,000, which sum had been paid to each annually up to 1926. In addition, the decedent had given Mrs. Plumb $1,500 at the time of the birth of the latter's son and $5,000 in 1917. The decedent had also paid $30,000 for a house for Mrs. Plumb and in 1925 had made her a gift of $5,000, similar gifts having been made to the decedent's deceased daughter. (R. 112, 117, 119, 121, 129, 134, 135, 138, 144–145.) No evidence was adduced as to the financial condition of Mrs. Plumb or her husband, but the father and guardian of the three minor sons of the deceased daughter testified that his wife's estate was approximately $50,000, which included the value of the home the decedent had given her (R. 144). The evidence further disclosed that about the time the decedent was declared incompetent her accumulated income was $757,214.25, substantially all of which had been derived from her husband's

estate (R. 147), and that it required between $1,500 and $2,000 per month for her maintenance (R. 148). Furthermore, at this hearing Mrs. Plumb consented that any allowance made to her which exceeded that made to the guardian of her deceased sister's minor sons should, to the extent of the excess, be considered an advancement to her, to be charged as such against her share of the decedent's estate at the latter's death (R. 136–139).

The evidence was, however, devoid of any showing that the decedent would have made allowances to her living daughter and to the minor sons of her deceased daughter in excess of $6,000 per year had she remained competent. Nevertheless, upon the recommendation of the referee (R. 168–169), the court made an order granting the allowances as prayed for, based upon the following findings and conclusions (R. 171–172):

> ON READING AND FILING the testimony taken at said hearing and the report of the said Referee, and it appearing to my satisfaction that the income of the said incompetent for the last four or five years has averaged over Three Hundred Thousand Dollars, and that to maintain and support the incompetent, and to care for her property, there cannot reasonably be expended a greater sum than Fifty Thousand Dollars, and that the said Helen Hall Vail has not made a last will and testament and that the said MaBelle Houghton Plumb, the only surviving child of said incompetent, or her

> issue, and the said John H. Harris, William R. Harris and David F. Harris, the three children of a deceased daughter of said incompetent, or their issue, will be, upon the death of said incompetent, the only heirs-at-law and next-of-kin of said incompetent, and the only persons entitled to share in her estate, and this Court having found and hereby finding, upon the evidence submitted before said Referee and to this Court, that if the said incompetent Helen Hall Vail were in the possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowance to such persons out of her property.

The evidence taken before the referee on the second petition disclosed that the decedent's accumulated surplus income was then $1,051,078.56 (R. 207), and that in addition there was property of the value of about $900,000 (R. 220); that her annual income from her husband's estate was $382,770.84 in 1931, exceeding that for 1930 of $378,016.09 (R. 258), and that in addition there was $77,412.78 income from her own estate (R. 211–212).

The only evidence as to the necessity for an increase in the allowance of $50,000 awarded to Mrs. Plumb in 1927 was that her son was about to go to college and that the allowance she was then receiving was not entirely sufficient to defray the expenses of sending him there (R. 227). As

regards the necessity of an additional allowance to the three minor sons of the decedent's deceased daughter, their father and guardian testified that his married life has been characterized by a good deal of luxury; that he had travelled abroad, conducted a large house with quite a number of servants, with all of which the incompetent had been familiar; that he had never been dependent upon her for support or financial aid (R. 241–242); that the three children lived with him, went to school, he paying their expenses and for other things required by way of their support and maintenance, and that all their moneys were invested in legal securities (R. 243). At the close of the testimony, the attorney for the petitioner, which was then acting as the committee of the decedent's property, stated, among other things, that to him the application was not a matter of obtaining an allowance; but rather the idea of distributing the incompetent's property in contemplation more or less of her death, and that he did not think the court, simply because a person was incompetent, had an inherent power to give away an incompetent's property (R. 261–262). Furthermore, the attorney for the guardian of the three minor boys stated that he did not pretend to the referee that the $50,000 annual allowance already made was not adequate for the support and maintenance of the three small boys. He said he thought that sum was adequate, and in addition, that their father was perfectly able to

take care of them and give them such education and physical comforts as they needed[1] (R. 262); that the only theory he could stand on in "this court" was the thought that the advancement was proper and should be made under the circumstances (R. 264).

There was no evidence adduced at this hearing that the incompetent, had she remained competent, would at any time have increased the allowances retroactively by $25,000, or by any other amount. Upon the referee's report recommending the increase in the allowances, the court made an order therefor based upon the following findings (R. 286–287):

> On reading the testimony taken at said Hearing from which it appears that there is accumulated income in the possession of the Committee of an inventoried value of $1,051,078.56, and whereas from the said testimony it appears that the income for the past five and one-half years has averaged about $395,000.00 a year, and the surplus income after paying all expenses, including allowances heretofore granted by the Order of January 14th, 1927, and paying all expenses, and etc. on account of the incompetent for her care and main-

[1] The court below had found that the father of these children had an annual gross income of $200,000 (R. 409). Presumably, there was adequate basis in the evidence presented to it for such a finding. In any event, the evidence upon which this finding is based was omitted from the record here presented (but see R. 66).

> tenance averaged about $191,105.18 a year, and it further appearing that said Helen Hall Vail is seventy-seven years of age and will not recover from the disease from which she is suffering and that her only issue is the petitioner, MaBelle Houghton Plumb and her son, Joseph H. Plumb, Jr., and the three infants, John H. Harris, William R. Harris and David F. Harris, children of a deceased daughter of the incompetent, and that said Helen Hall Vail has not made her Last Will and Testament, and that upon the death of the said incompetent the only persons entitled to share in her estate will be the said MaBelle Houghton Plumb the only surviving child of said incompetent and her son, Joseph H. Plumb, Jr., and the said John H. Harris, William R. Harris and David F. Harris the three children of a deceased daughter of said incompetent, or their issue * * *.

From these findings, the court concluded (R. 287)—

> that if the said incompetent, Helen Hall Vail, were in possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowances to such persons out of her property. * * *.

The payments made under these orders, aggregating $1,377,866.67, were included by the Com-

missioner in the decedent's gross estate, resulting in a deficiency determination in estate taxes of $653,812.29 (R. 376–380), which was paid.

The District Court, after making findings regarding the facts presented to the Supreme Court of New York, substantially similar to those made by that court, made the following findings concerning the nature of the proceedings in that court and of the orders made by it therein (R. 409–411):

> XXI
>
> Neither the petition of 1926 nor that of 1932 show, nor was any proof offered in support thereof to show the need of any allowance to any of the direct or collateral heirs. The petition of 1932 shows no need of any allowance to any of the direct heirs and does not mention the collateral heirs.
>
> XXII
>
> The Referee in the 1926 proceeding recommended an allowance of $50,000 to the General Guardian of the Harris children to be applied by him to their "maintenance and support." During this period the father of these children had an annual gross income of $200,000.
>
> XXIII
>
> The records of the proceedings in 1926 and 1932, specifies the intent and purpose to equalize allowances to direct heirs so that

each would share equally in the estate of the incompetent upon her death.

XXIV

The increase in the allowance in 1932 was a gift made in anticipation of succession to the estate by MaBell Houghton Plumb and the children of Laura Houghton Harris the only direct heirs of the incompetent.

XXV

The making of the retroactive allowances aggregating $250,000 was a means of distributing part of the incompetent's estate in anticipation of her death.

XXVI

A substantial part of this estate was withdrawn by these allowances. The amount, as heretofore stated, was $1,377,866.67.

XXVII

In the proceedings by which the allowances were made to MaBelle Houghton Plumb and others by the Supreme Court of the State of New York, New York County, Mrs. Plumb stipulated that the ultimate amount she should receive from the estate of the incompetent on the death of the incompetent should not exceed that to be paid the General Guardian on account of the Harris children; and these allowances were characterized in the stipulations as "advancements."

XXVIII

All sums of money paid to MaBelle Houghton Plumb and Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of the incompetent, Helen Hall Vail, and to Edward Hegeman Hall, Mary Hall Taft, Elizabeth Hall Burdick, Abbe Ferrin and Lucy Hall Ferris, by the Committee of the property of Helen Hall Vail, pursuant to the order entered by Honorable Richard P. Lydon, Justice of the Supreme Court of the State of New York, on January 14, 1927, and pursuant to the order entered by Hon. Phoenix Ingraham, Justice of the Supreme Court of the State of New York, on June 3, 1932, were motivated by the same considerations that lead to, and were intended as, testamentary dispositions of the property and the estate of the incompetent and were transfers made in contemplation of death and in anticipation of the succession to the estate of said incompetent, save and except the sum of $6,000 paid annually to MaBelle Houghton Plumb and Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of the incompetent, and except the sum of $500 paid annually to Lucy Hall Ferris.[2]

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[2] These sums were excepted by the district court since the decedent had made similar annual gifts before becoming incompetent (see Statement, *supra*, p. 4) and hence such gifts "were motivated by the same motive which would have lead the incompetent, Helen Hall Vail, to make payments in these amounts to these respective parties" (R. 399).

From the findings thus made, the District Court concluded that the allowances were "made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended by Section 803 (a) of the Revenue Act of 1932, now Section 811 (c) of the Internal Revenue Code" (R. 411), and that, upon the facts and evidence the respondent was entitled to judgment dismissing the petitioner's complaint except that the parties had stipulated and agreed that the petitioner was entitled to judgment under the decision of the District Court (after credit for payment of additional state inheritance taxes to the States of New York and Florida, respectively) in the sum of $54,100.24, with interest (R. 416–417). The court below affirmed this judgment (R. 444–445), Judge Swan dissenting (R. 442–444).

ARGUMENT

1. The court below stated that the property of the decedent was "transferred" by the orders of the New York Supreme Court, on the ground that New York law gave the judges of the state court the necessary power (R. 438–440). Hence, it said that the question before it, whether the property of the decedent was transferred by the orders of the New York court in contemplation of her death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended (Appendix, *infra*, pp. 20–21), resolved itself into two parts. The first, which is the principal question in the case, is whether Section 302 (c) covered the pay-

ments here, in case they were made in contemplation of death, and the second is whether they were made in such contemplation. (R. 437–438) The court below considered these questions in the order stated, assuming for the purpose of its discussion of the first that the transfers were made in contemplation of the decedent's death. After deciding that the New York Supreme Court's action in making the transfers was attributable to the decedent, the court held that the transfers were made in contemplation of her death and were accordingly includible in her gross estate.

(a) We submit that petitioner's assertion (Pet. 12) that the decision of the court below, insofar as it imputed the making of the transfers here in question, together with their incidents, to the decedent, is in probable conflict with *United States* v. *Wells*, 283 U. S. 102, is without merit. The transfers under consideration in the *Wells* case were made by the decedent himself, who was competent, and the only question before the Court was whether Congress had intended to restrict the application of the statute to transfers made in fear or expectation of imminent death. This Court rejected the interpretation of the Court of Claims that a transfer was includible in the decedent's gross estate only where it was immediately and directly prompted by an expectation of death, because such an interpretation would defeat the dominant purpose of Congress to reach substitu-

tion for testamentary disposition and thus prevent the evasion of the estate tax. The Court said (283 U. S. at p. 117) that, as a transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. "Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition" (*ibid.*). Nothing in the *Wells* case justifies a conclusion that the Court either in substance or effect condemned the attribution to an incompetent of a gift made for her by a duly constituted agent in contemplation of her death. In fact, in another connection, the petitioner states (Pet. 15), "The research of counsel has discovered no cases similar to that at bar."

(b) There is no proper basis for petitioner's assertion (Pet. 13) that the statute does not cover the transfers here in question, because it contemplates a transfer by the decedent personally and the contemplation of death must be that of the decedent personally.

Certainly it could not be successfully contended that if the decedent had herself given a power of attorney to another to deal with her property, a transfer made by such attorney, because of the imminence of the decedent's death and in order to avoid the tax, would not have been made in contemplation of her death within the meaning of the statute. Here, since the decedent was incompetent, the law of New York constituted its courts

the agent of the incompetent, placing the custody of her property in their hands with power to administer it, including the power to make certain allowances to her family. Section 1357 of the New York Civil Practice Act; see also the authorities cited by the District Court (R. 392). Manifestly, whatever disposition the courts were empowered by the law of New York to make of the incompetent's property was made in her name and for her use and benefit. Hence there can be no question, we think, that the transfers here were gifts attributable to the incompetent, so that they attracted the gift tax for which she became personally liable. The court below so held as to those of the transfers here in question which were made subsequent to the disposition of the 1932 gift tax (*City Bank Farmers Trust Co.* v. *Hoey*, 101 F. 2d 9), and the Circuit Court of Appeals for the Ninth Circuit has subjected similar transfers to the gift tax. *Commissioner* v. *Greene*, 119 F. 2d 383, certiorari denied, 314 U. S. 641. If a gift made by a court for an incompetent is attributable to her, there would appear to be no sound reason for saying that the purpose for which it is made is not likewise attributable to her.

For these reasons, it is submitted that the construction placed upon the statute does no violence to the Congressional intent. On the contrary, it is a rational construction and furthers the dominant purpose of Congress to prevent evasion of the

tax. *United States* v. *Wells*, 283 U. S. 102, 117; *Milliken* v. *United States*, 283 U. S. 15, 20; *Nichols* v. *Coolidge*, 274 U. S. 531, 542.

2. Petitioner's contention (Pet. 7–11) that the decision of the court below is in conflict with applicable local decisions dealing with the power of the New York court to distribute portions of the incompetent's estate is irrelevant. The petitioner does not challenge the Second Circuit's definition of the statutory phrase "contemplation of death," and we submit it could not successfully do so. Its contention is that the New York court had no power under local law to make a transfer of any portion of an incompetent's property and has not expressly stated that it did, and that consequently it must be presumed conclusively, even contrary to the fact, that it did not do so. However, since the incompetent's property was actually transferred, the only question is whether the transfers made are of the sort that fall within the purview of the federal statute. Contrary to petitioner's views (Pet. 11), it was therefore not necessary that a finding should be made in this proceeding that the New York court exceeded its jurisdiction or abused its discretion in granting the allowances.

The question as to what the New York judges actually meant to do when making the allowances is a question of fact. Both the District Court and the court below have found that, insofar as the allowances exceeded those which the decedent had

actually made prior to incompetency, they were meant to be advancements to the decedent's heirs on account of the property which they would receive at her death and as a result thereof. The District Court found (R. 409–410) that the records in the allowance proceedings in 1926 and 1932 specified the intent and purpose of the New York judges, acting for the incompetent, to equalize the allowances to the direct heirs so that each would share equally in the estate of the incompetent upon her death and that the increases in the allowances in 1932 were gifts made in anticipation of succession to the estate by the decedent's living daughter and the children of her deceased daughter, who were her only direct heirs; that the making of the retroactive allowances aggregating $250,000 was a means of distributing a part of the incompetent's estate in anticipation of her death, and that as a result a substantial part thereof, namely, $1,377,866.67, was withdrawn therefrom by these allowances.

The court below obviously accepted this finding; and, since the allowances, so far as they exceeded $6,000 per year to the decedent's living daughter and a like amount to the minor boys of her deceased daughter (see Statement, *supra*, p. 4), actually constituted advancements to them on account of what they would receive of the decedent's property as her heirs at her death, it undertook to rationalize (R. 438) the finding of the New York court that the decedent would have made the

gifts, upon the only possible basis that such finding could be rationalized (*viz.*, that the decedent would have made the gifts if she were competent and foresaw her future incompetency). The taxpayer has failed to suggest any other.

CONCLUSION

We believe that the circuit court of appeals correctly construed and applied the federal statute. While the question presented is novel, the decision is confined to the peculiar facts presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Sec. 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States.

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) [as amended by Sec. 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or

money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

New York Civil Practice Act (Cahill, Seventh Edition):

SEC. 1356. *Jurisdiction of supreme court; concurrent jurisdiction of county court.* The jurisdiction of the supreme court extends to the custody of the person and the care of the property of a person incompetent to manage himself or his affairs in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the supreme court, the jurisdiction of the court first exercising it, as prescribed in this article, is exclusive of that of the others with respect to any matter within its jurisdiction for which provision is made in this article. (Code Sec. 2320, in part.)

SEC. 1357. *Duty of court having jurisdiction.* The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts and for the safe keeping and maintenance, and the education, when required, of the incompetent person and his family. (Code. Sec. 2321.)

SEC. 1383. *Death of incompetent; duty of committee.* Where a person, of whose property a committee has been appointed, as prescribed in this article, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of as if a committee had not been appointed. The committee, in such case, shall render to the court by which he was appointed a final account of his proceedings touching the property of the incompetent. Notice of the application for settlement of such account shall be given, in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. (As amended by L. 1935, ch. 724, September 1. Code Sec. 2344, in part.)

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